(1) Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

LEVON HOPKINS,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should an Ohio anti-discrimination statute whose coverage excludes all discharged employees who have been afforded the opportunity to arbitrate their discharges be pre-empted by well-established contrary federal law which safeguards unionized employees' access to the courts to contest unlawful discriminatory discharges?

2. Should an Ohio anti-discrimination statute whose coverage excludes all discharged employees who have been afforded the opportunity to arbitrate their discharges be pre-empted by the National Labor Relations Act, 29 U.S.C. § 141, because its effect is to penalize unionized employees, thereby discouraging them from opting for union representation?

LIST OF PARTIES

Petitioner: Levon Hopkins

Respondent: United Parcel Service, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Levon Hopkins, respectfully prays that a writ of certiorari be issued to review the final judgment of the Ohio Supreme Court.

OPINIONS BELOW

The opinion of the Court of Appeals, First Appellate District of Ohio (Hamilton County) was issued on February 11, 2000 and was unreported as Appeal No. C-990392. A copy of the decision is attached as App. 2 of the Appendix. The decision of the Ohio Supreme Court declining jurisdiction to hear the case on Petitioner's appeal was also unreported as Case No. 00-557. A copy of the decision is attached as App. 1 of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) to review the decision of the Ohio Supreme Court, the highest court in the State, entered on June 14, 2000.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 provides, in pertinent part, as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives

> of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection,. . . .

Ohio Revised Code, § 4112.02(A) reads in pertinent part as follows:

> It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, disability, age or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person. . . .

Ohio Revised Code, § 4112.14(C) reads in pertinent part as follows:

> (C) The cause of action described in division (B) of this section and any remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code shall not be available in the case of discharges where the employee has available to him the opportunity to arbitrate the discharge or where the discharge has been arbitrated and has been found to be for just cause.

STATEMENT OF THE CASE

Levon Hopkins, the Petitioner herein, is an African-American. He was, for all times material herein, employed by United Parcel Service, Inc. (herein "UPS") as an over-the-road truck driver. During his employment, he was a member of a collective bargaining unit represented by Local 100 of the International Brotherhood of Teamsters (herein "the Teamsters" or "the Union"). The

Teamsters were signatory, along with UPS, to a collective bargaining agreement, (herein "the Agreement"). The Agreement contained a grievance procedure whereby an employee protesting his discharge could appeal the decision of his supervisors to a local panel composed of his union representative and a local company representative. If no consensus could be reached at that level as to the propriety of the discharge, the employee could appeal the termination to the Ohio Joint State Committee (herein "the OJSC"), which sat in Columbus, Ohio. The Committee was composed of an equal number of Teamsters and UPS representatives, which heard a succession of employee grievances, including termination-related grievances, which were brought before it. It had no neutral members. The grieving employee would be represented at the OJSC by a union representative. The OJSC, after hearing the presentation, would adjourn and vote whether or not to uphold or reverse the termination. The decision of the OJSC was final and binding.

On May 3, 1996, Petitioner Hopkins was terminated by UPS purportedly for having exceeded the limit of avoidable accidents in a given period of time. Mr. Hopkins filed a grievance over his termination. One of the grounds for his grievance was that similarly-situated Caucasian drivers were not terminated after having the same number of avoidable accidents, but were invariably given lesser penalties.

When Mr. Hopkins was unable to resolve the grievance at the local level, it was appealed to the OJSC. Mr. Hopkins' grievance was heard, along with numerous other grievances, on May 13, 1996 in Columbus. Mr. Hopkins' union representative met with him only shortly

before his hearing was to begin. Mr. Hopkins told him he wanted to argue to the OJSC that his termination was unlawfully motivated by his race. The union representative, however, instructed Mr. Hopkins not to raise the race issue. The hearing then ensued. After deliberating, the OJSC panel voted to uphold Mr. Hopkins' discharge. The race discrimination issue was never addressed.

Mr. Hopkins subsequently filed a lawsuit in the Hamilton County Court of Common Pleas alleging that his termination was based on race and thus violated Ohio's anti-discrimination statute, Ohio Revised Code, § 4112. The trial court granted UPS' Motion to Dismiss and Motion for Summary Judgment relying on, *inter alia*, § 4112.14(C) of the Ohio Revised Code, which reads as follows:

> (C) The cause of action described in division (B) of this section and any remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code shall not be available in the case of discharges where the employee has available to him the opportunity to arbitrate the discharge or where the discharge has been arbitrated and has been found to be for just cause.

The trial court read § 4112.14(C) of the Ohio Revised Code to divest Ohio courts of jurisdiction to hear Mr. Hopkins' claim of race discrimination, due to the availability to Mr. Hopkins of an arbitration remedy under the collective bargaining agreement.

The Court of Appeals for the First Appellate District of Ohio upheld the lower court's dismissal of Petitioner Hopkins' suit. In so doing, the Court relied exclusively on the language in Ohio Revised Code, § 4112.14(C) which

denied terminated employees "any remedies available" under the anti-discrimination statute, including the right to bring a suit in state court to undo an unlawful discriminatory termination where, as here, arbitration was an alternative remedy. The fact that § 4112.14 was entitled "Discrimination *Because of Age* by Employers; Civil Action" (emphasis added) was deemed by the Appellate Court to be irrelevant in that subsection C thereof referenced the unavailability of other remedies under the entire Chapter 4112. The decision of the Court of Appeals is set forth in full beginning on App. 2 of the attached Appendix.

On March 29, 2000, Petitioner Hopkins filed an appeal with the Ohio Supreme Court requesting that it take jurisdiction over the case and hear Petitioner's appeal. In his memorandum in support of jurisdiction, Petitioner Hopkins argued that Ohio Revised Code, § 4112.14(C) should be struck down as contrary to established federal law. Relevant excerpts from Mr. Hopkins' brief in support of jurisdiction are set forth beginning on App. 8 of the attached Appendix.

On June 14, 2000, the Ohio Supreme Court issued its decision in which it declined jurisdiction to hear the case. A copy of this decision is attached as App. 1 of the Appendix.

REASONS FOR GRANTING THE WRIT

I. OHIO REVISED CODE, § 4112.14(C), WHICH EXCLUDES FROM ITS COVERAGE ALL DISCHARGED EMPLOYEES WHO HAVE BEEN AFFORDED THE OPPORTUNITY TO ARBITRATE THEIR DISCHARGES, SHOULD BE PRE-EMPTED AS CONTRARY TO ESTABLISHED FEDERAL LAW WHICH SAFEGUARDS UNIONIZED EMPLOYEES' ACCESS TO THE COURTS TO CONTEST UNLAWFUL DISCRIMINATORY DISCHARGES.

It is well-established federal law that employees claiming unlawful on-the-job discrimination under Title VII of the Civil Rights Act may not be denied access to a judicial forum to vindicate his statutory rights merely because he is covered by a collective bargaining agreement which calls for arbitration of his discharge grievance. This principle was first enunciated by the United States Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974), and has been reaffirmed in subsequent decisions. See *McDonald v. West Branch*, 466 U.S. 284, 80 L.Ed.2d 302, 104 S.Ct. 1799 (1984); *Barrentine v. Arkansas-Best Freight System Inc.*, 450 U.S. 728, 67 L.Ed.2d 641, 101 S.Ct. 1437 (1981). There was an apparent retreat from the *Alexander* doctrine when, in 1991, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L.Ed.2d 26, 111 S.Ct. 1647 (1991). In *Gilmer*, the Court ruled that when an employee negotiated at arms length with his employer an employment agreement containing a provision mandating arbitration of all contract disputes, even disputes involving claims of unlawful on-the-job discrimination or discharge, his sole recourse was to seek arbitration of the

dispute. He was precluded from contesting the legality of his discharge in court. By entering into the employment agreement, the employee in effect knowingly waived his right to seek recourse in the courts. Of course, *Gilmer*, unlike *Alexander*, involved an individual one-on-one employment agreement, not a collective bargaining agreement. *Alexander* and *Gilmer* were recently harmonized by the Supreme Court in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 142 L.Ed.2d 361, 119 S.Ct. 391 (1998). *Wright*, like *Alexander*, involved a unionized employee who claimed violation of his statutory employment rights. The overriding issue in *Wright* was the knowing waiver of one's statutory rights. The Court in *Wright* ruled that the right to a federal judicial forum is of sufficient importance that a waiver of that right, whether by the employee or his union, must be "clear and unmistakable". 525 U.S. at 82. Whether a clear and unmistakable waiver existed in any given case turned on a painstaking analysis of the various provisions of the collective bargaining agreement to ascertain whether the union intended that an employee could vindicate his statutory rights through arbitration and not through the courts. Absent such a waiver, the employee could not be denied access to the courts.

However, the state statute at issue herein, Ohio Revised Code, § 4112.14(C) obviates the need for such an analysis. If employees, like Petitioner Levon Hopkins, are covered by a collective bargaining contract containing an arbitration clause, he is *ipso facto* precluded from filing a suit in state court under Ohio's comprehensive anti-discrimination statute to contest his race- or sex- or age-

biased termination.[1] The Ohio statute has done away with completely the Supreme Court's requirement that the union (or the employee) waive the employee's right to seek judicial relief, and that such waiver be clear and unmistakable.

What in essence exists here is a state statute which is totally at odds with the aforesaid federal judicial policy of favoring judicial, rather than arbitral, resolution of statutory claims of employment discrimination, absent very persuasive evidence of waiver statutory remedies. Such an offending state statute should be preempted. *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 564-65, 94 L.Ed.2d 563, 107 S.Ct. 1410 (1987), Cf. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412, 100 L.Ed.2d 410, 108 S.Ct. 1877 (1988).

It should matter not that Ohio Revised Code, § 4112.14(C) bars unionized employees access to state courts rather than federal courts to vindicate their rights under state anti-discrimination laws rather than federal anti-discrimination laws. Parallel state anti-discrimination laws, like Ohio's Chapter 4112, are an integral element of Title VII's enforcement plan. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982); *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994); *Salgado v. Atlantic Richfield*, 823 F.2d 1322, 1326 (9th Cir. 1987).

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[1] While § 4112.14(C) by its heading is applicable to claims of *age* discrimination, the Ohio Court of Appeals and Supreme Court has interpreted that section as applying to *all* forms of prohibited discrimination.

For all of these reasons, § 4112.14(C) should be pre-empted as contrary to established federal law which, absent very limited circumstances of clear and unmistakable waiver by the union, assures unionized employees access to state or federal courts to vindicate their rights under federal or state anti-discrimination laws.

II. OHIO REVISED CODE, § 4112.14(C), WHOSE COVERAGE EXCLUDES ALL DISCHARGED EMPLOYEES WHO HAVE BEEN AFFORDED THE OPPORTUNITY TO ABITRATE THEIR DISCHARGES SHOULD BE PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 141, BECAUSE ITS EFFECT IS TO PENALIZE UNIONIZED EMPLOYEES, THEREBY DISCOURAGING THEM FROM OPTING FOR UNION REPRESENTATION.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in pertinent part, as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection,. . . .

Ohio Revised Code, § 4112.14(C) operates to discourage employees from choosing union representation. By its very terms. the Ohio law punishes unionized employees, who are invariably covered by collective bargaining agreements containing some form of arbitration. These employees may not seek redress in Ohio's courts for violation of their statutory right to be free from unlawful

workplace discrimination. All other employees in Ohio, with certain limited exceptions noted below, have full access to the courts.

The United States Supreme Court has never hesitated to pre-empt state statutes which frustrate one of the overarching purposes of the National Labor Relations Act, to protect the exercise of the right of employees, as guaranteed by § 7 of the Act, to engage in self organization, and join unions for the purpose of collective bargaining. In *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383, 95 L.Ed. 364, 71 S.Ct. 359 (1951), the Supreme Court addressed a Wisconsin statute which prohibited strikes against public utilities, providing instead for post-impasse compulsory arbitration of labor disputes. The Court struck down this state law because it conflicted with the National Labor Relations Act, which protected the right of employees to bargain with their employer for higher wages, and, if necessary, to engage in peaceful strikes in order to attain their bargaining objectives. As the Wisconsin Act was in direct conflict with the National Labor Relations Act, it was invalid under the Supremacy Clause of the United States Constitution.

The Supreme Court has since had occasion to apply its pre-emption doctrine to state statutes or policies that, while they didn't directly regulate collective bargaining, operated to frustrate the purposes of the NLRA by penalizing employees who belong to unions. In *Nash v. Florida Industrial Commission*, 389 U.S. 235, 19 L.Ed.2d 438, 88 S.Ct. 362 (1967), the Supreme Court struck down a state law which withheld unemployment benefits from an

employee solely because the employee had filed an unfair labor practice charge with the National Labor Relations Board. The Florida law had a "direct tendency to frustrate the purposes of Congress" and, unless pre-empted, would "defeat or handicap a valid national objective by . . . withdrawing state benefits" from an employee simply because he engaged in conduct protected and encouraged by the NLRA. 389 U.S. at 239. Similarly, in *Livadas v. Bradshaw*, 512 U.S. 107, 129 L.Ed.2d 93, 114 S.Ct. 2068 (1994), the Supreme Court struck down as pre-empted a California statute that required employers to pay all wages due their employees immediately upon their discharge unless they were covered by a union contract containing an arbitration clause. The Court reasoned that a "state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." 512 U.S. at 116. The Court further reasoned that an employee ought not to be faced with the "unappetizing choice" of having state law rights enforced in their favor or exercising the right to enter into collective bargaining agreements with arbitration clauses. 512 U.S. at 117.

The case placed before this Court by Petitioner Hopkins is no less compelling than those posed in *Nash* and *Livadas*. Levon Hopkins, and tens of thousands of other unionized workers in Ohio, are faced with the same unappetizing choice. By virtue of Ohio Revised Code, § 4112.14(C), they, too, must choose between having access to state courts to vindicate their statutory rights and exercising the right to enter into collective bargaining agreements with arbitration clauses. Employees should not be forced to renounce collective bargaining in order

to gain access to the courthouse door. However, by exacting such a price for access, the Ohio law operates to chill union activity.

To be sure, § 4112.14(C) does not, by its literal terms, apply only to unionized employees. Any employee who has available to him the opportunity to arbitrate his discharge is also disenfranchised from the coverage of Ohio's anti-discrimination laws. This would presumably include those relatively limited number of employees who are parties to individual employment agreements. But the brunt of § 4112.14(C) is disproportionately borne by unionized employees who are invariably covered by collective bargaining agreements containing mandatory arbitration clauses. Therefore, the special coercive effect that § 4112.14(C) places upon union employees is beyond dispute.

CONCLUSION

For all of the reasons set forth above, a Writ of Certiorari should be granted in this case so that this Court may take jurisdiction to determine whether the federal pre-emption doctrine should be extended to strike down state laws like Ohio Revised Code, § 4112.14(C) which frustrate the dual Congressional purposes of (1) safeguarding the access of employees to the courts to sue for unlawful workplace discrimination absent clear and unmistakable waiver of their right to do so, and (2) protecting the right of employees to form or join unions for the purpose of collective bargaining.

Respectfully submitted,

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The Supreme Court of Ohio

Levon Hopkins,	:	Case No. 00-557
Appellant,	:	ENTRY
v.	:	(Filed Jun. 14, 2000)
United Parcel Service, Inc.,	:	
Appellee.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

Upon consideration of the motion for admission *pro hac vice* of Tony C. Coleman and Julie C. Foster by H. Lawson Walker,

IT IS ORDERED by the Court that the motion for admission *pro hac vice* be, and hereby is, denied.

COSTS:

Docket Fee, $40.00, paid by Schwartz, Manes & Ruby.

(Hamilton County Court of Appeals; No. C990392)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LEVON HOPKINS, Plaintiff-Appellant, vs. UNITED PARCEL SERVICE, INC., Defendant-Appellee.	:	APPEAL NO. C-990392 TRIAL NO. A-990860 *DECISION.* (Filed Feb. 11, 2000)

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 11, 2000

Donald B. Hordes, H. Toby Schisler, and *Schwartz, Manes & Ruby,* for Plaintiff-Appellant,

H. Lawson Walker, II, and *Christie L. Pattinson, Brown, Todd & Heyburn, PLLC,* for Defendant-Appellee.

Per Curiam.

Plaintiff-appellant, Levon Hopkins, appeals the summary judgment entered by the Hamilton County Court of Common Pleas in favor of defendant-appellee, United Parcel Service, Inc. ("UPS"), in a race-discrimination case brought under R.C. Chapter 4112. For the following reasons, we affirm the judgment of the trial court.

Hopkins was employed by UPS as a driver for approximately nineteen years. UPS terminated his employment in 1996, citing as its reason the fact that Hopkins had been involved in three "avoidable" accidents within a one-year period. Hopkins filed a grievance with his union, and a local hearing was conducted in early May 1996. That hearing was conducted before a panel consisting of UPS managers and a representative from the union. The panel could not reach a consensus on the propriety of the termination, and pursuant to the collective-bargaining agreement, the termination was therefore upheld.

Hopkins appealed the result of the first grievance hearing, and his case then went before the Ohio Joint State Committee ("OJSC") in Columbus. The OJSC grievance panel was made up of two UPS representatives and two union representatives. After a hearing conducted May 13, 1996, the OJSC held that Hopkins's termination was for just cause.

In January 1998, Hopkins filed an action in federal court, seeking relief under federal and state law. The federal claim was dismissed as untimely, and the court dismissed the state claim without prejudice. Then, in February 1999, Hopkins filed the state-law claim in the Hamilton County Court of Common Pleas.

UPS filed a motion to dismiss and for summary judgment, and the trial court granted the motion in an entry journalized May 13, 1999.[1] The trial court held that the

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[1] Though the trial court did not specify whether it granted the motion pursuant to Civ.R. 12 or Civ.R. 56, we construe the

action was filed past the applicable statute of limitations and that it was barred pursuant to the arbitration provision of R.C. 4112.14(C). This appeal followed.

Because we find the second assignment of error dispositive of the appeal, we address it first. In that assignment, Hopkins contends that the trial court erred in granting summary judgment on the basis that Hopkins had arbitrated his claim and was therefore precluded from filing suit pursuant to R.C. 4112.14(C). We are not persuaded.

Pursuant to Civ.R.56(C), a motion for summary judgment is to be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and, with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.[2] This court's review of the granting of a motion for summary judgment is *de novo*.[3]

In the case at bar, we find no error in the trial court's granting of summary judgment. R.C. 4112.14(C), governing the effect of the availability of arbitration on the maintenance of a civil suit, provides the following:

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entry as a grant of summary judgment, as it is evidence from the record that the trial court considered material outside of the pleadings in reaching its decision.

[2] *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589, 639 N.E.2d 1189, 1192.

[3] *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

> The cause of action described in division (B) of this section and other remedies available under this chapter shall not be available in the case of discharges where the employee has available to the employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has found to be for just cause.

Hopkins first contends that the foregoing language applies only to age-discrimination claims and that the trial court erred in finding his race-discrimination claim to be barred. We cannot accept Hopkins's construction of R.C. 4112.14(C). The plain language of the statute indicates the General Assembly's intent to bar civil actions for age discrimination as well as "other remedies available under this chapter" when the employee has the ability to arbitrate his claims. To hold that the statute applies only to age-discrimination claims would in effect be to eliminate the language regarding "other remedies," a modification this court is not empowered to effectuate.[4]

In further support of his position, Hopkins emphasizes that the heading of R.C. 4112.14 indicates that the statute is intended to govern only age-discrimination claims. This argument is not persuasive in light of R.C. 1.01, which provides that the language of a statutory heading is not part of the statute and cannot be invoked to limit a statute's effect.[5] Similarly, Hopkins contends that, in general, the subject matter of R.C. 4112.14 is age discrimination and that the statute should, therefore, be

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[4] See *State ex rel. Crosset Co. v. Conrad* (2000), 87 Ohio St.3d 467, ___ N.E.2d ___.

[5] See *State ex rel. Larkins v. Baker* (1995), 73 Ohio St.3d 658, 653 N.E.2d 701.

construed as relating to only age-discrimination claims. Once again, this argument is not persuasive, in view of the unambiguous language preventing other remedies under R.C. Chapter 4112 when the employee has the opportunity to seek arbitration.

Hopkins next argues that, even if R.C. 4112.14(C) applies to race-discrimination claims, he did not arbitrate his claim within the meaning of the statute. He contends that the UPS grievance procedure did not constitute "arbitration" because the panel included management representatives.[6] Hopkins argues that, therefore, the grievance process lacked the indicia of impartiality that the term "arbitartion" implies. Similar arguments have been raised and rejected in prior cases, with the courts holding that the UPS grievance mechanism does possess the requisite procedural safeguards to be deemed arbitration.[7] We find the reasoning of those cases to be persuasive. Moreover, any deficiencies cited by Hopkins, such as the fact that he was not represented by an attorney and did not assert his race-discrimination claim in the grievance hearings, were the products of his own inaction and were not flaws inherent in the grievance procedure. We therefore find no error in the trial court's holding that Hopkins's claim was barred by R.C. 4112.14(C), and we accordingly overrule the second assignment of error.

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[6] Hopkins also notes that the interests of the employee and the union are not necessarily aligned and that, therefore, the presence of union representatives on the panel does not necessarily ensure impartiality.

[7] See *United Parcel Service, Inc. v. Mitchell* (1981), 451 U.S. 56, 101 S.Ct. 1559; *Vanderveer v. United Parcel Service, Inc.* (C.A.6, 1994), 25 F.3d 403.

Having held that the trial court properly granted summary judgment based upon R.C. 4112.14(C), we need not address the first assignment of error, in which Hopkins argues that the court erred in holding that his claim was barred by the statute of limitations. We hold that the first assignment of error is moot, and we therefore affirm the judgment of the trial court.

Judgment affirmed.

DOAN, P.J., GORMAN and SHANNON, JJ.

RAYMOND E. SHANNON, retired, of the First Appellate District, sitting by assignment.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

IN THE SUPREME COURT OF OHIO

LEVON HOPKINS, APPELLANT, v. UNITED PARCEL SERVICE, APPELLEE.	On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C990392

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, LEVON HOPKINS,

(Filed Mar. 27, 2000)

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1913 (12th Appellate District), attached as Attachment J. These cases are nothing more than a logical offshoot of an earlier Ohio Supreme Court decision holding that employees have an unfettered right to have their statutory employment discrimination claims heard before a duly-appointed administrative tribunal or court, notwithstanding the fact that employees might also arbitrate their claims. *Youghiogheny & Ohio Coal Co. v. Oszust* (1986), 23 Ohio St.3d 39, 491 N.E.2d 298. Cf. *Gibney v. Toledo Board of Education* (1988) 40 Ohio St. 3d 152.

This case presents this Court with the ideal vehicle to extend the logic of *Youghiogheny* to cases involving employees' access to the Courts to protect their rights to be free from employment discrimination prohibited by Section 4112 *et seq.*

D. *The lower court's decision, if allowed to stand, would place Ohio law in direct conflict with parallel federal decisions addressing the identical issues.*

In *Alexander v. Gardner-Denver Co.* (1974), 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147, the United States Supreme Court held that an employee's right to a *de novo* trial to vindicate his rights under Title VII of the Civil Rights Act of 1964 was not foreclosed by prior submission of his claim to union-negotiated arbitration. *See also, Barrentine v. Arkansas-Best Freight System* (1981), 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641; (arbitration under a Collective Bargaining Agreement does not bar an employee from bringing a civil action alleging violations of the Fair Labor Standards Act); *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70, 119 S.Ct. 391 (Unionized employee's access to union-negotiated arbitration does

not constitute a waiver of his right to seek statutory relief.)

The lower court's decision is also directly at odds with decisions handed down by the Sixth Circuit on this issue. In both *Bratten v. SSI Services Inc.* (C.A.6 1999) 185 F.3d 625; and *Penney v. United Parcel Service* (C.A.6 1997) 128 F.3d 408, the Sixth Circuit upheld the right of unionized employees to bring claims of discrimination in violation of Title VII of the Civil Rights Act of 1964 even though they were also free to avail themselves of arbitration afforded them under their union contract.

It is well-established law in Ohio that Ohio courts interpreting Ohio Revised Code 4112 will give substantial deference to decisions of the United States Supreme Court and lower federal courts which interpret the parallel federal statute dealing with employment discrimination, Title VII of the Civil Rights Act, 42 U.S.C. Sec. 2000e. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n* (1981), 66 Ohio St.2d 192, 421 N.E.2d 128. Therefore, this Court should address and resolve this very important issue as to whether Ohio law and federal law should be in harmony as to an employee's unrestricted ability to seek civil relief in court for violation of his statutory employment rights.

E. *The lower court's decision, if allowed to stand, will result in the implementation of policy which is preempted by federal law.*

The lower court's decision establishes a regime in which employees who elect to unionize are penalized by the forfeiture of their right to seek redress in Ohio courts

for employment discrimination. In *Livadas v. Bradshaw* (1994), 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93, the United States Supreme Court addressed a California law that forced employers to pay wages to all employees immediately upon their discharge unless they were covered by a union contract containing an arbitration clause. The court ruled that the policy enunciated by that state law was pre-empted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* a federal statute that prohibits the coercion or penalization of employees who choose to unionize.

Similarly, as the lower court's decision in the case also works to discourage employees from unionizing, it, too, should be pre-empted by the National Labor Relations Act.

F. *The lower court's decision, if allowed to stand, will result in the implementation of a policy which runs counter to the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.*

The lower court's decision establishes a duality in coverage of Ohio Revised Code Chapter 4112. Non-union employees targeted by employment discrimination and harassment are bestowed the right to file suit in state court to bring an end to that discrimination or harassment. Similarly-situated unionized employees, on the other hand, are denied that right, all under color of state law. There being no rational basis or overriding justification for the classification of employees into union and non-union groupings, the lower court's decision operates

to deny unionized employees in Ohio the equal protection of the law as guaranteed them by the Fourteenth Amendment of the United States Constitution.

G. *The decision of the lower court is contrary to Ohio public policy.*

What the lower court has managed to do through its incorrect interpretation of O.R.C. Section 4112.14(C) is to exempt unionized employees from statutory protection against unlawful discrimination or harassment on the basis of race, sex, creed, national origin, age and disability. With one stroke of the pen, the First Appellate District has stripped hundreds of thousands of Ohio working people of their access to the courts solely by virtue of their status as members of a collective bargaining unit. Unionized employers will now be able, in Hamilton County at least, to fire employees with impunity based on their race or sex, or engage in, or countenance, sexual harassment of their female employees, without being held accountable in a court of law. These employees are not even guaranteed a modicum of due process through arbitration inasmuch as the decision to take a grievance to arbitration lies with the Union, not with the employee. The results are especially inequitable in the case of workplace sexual harassment, where the

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